UNITED STATES OF AMERICA v. DAVID M. HICKS	)	**PROSECUTION RESPONSE TO DEFENSE MOTION ALLEGING IMPROPER SELECTION OF COMMISSION MEMBERS** 18 October 2004

1. Timeliness. This Prosecution response is filed within the time frame established by the Presiding Officer.

2. Position on Motion. The Defense's motion alleging improper selection of Commission Members should be denied.

3. Overview. Military commissions are empanelled pursuant to Commission Law, not court-martial procedures. Seeking experienced members does not violate Commission Law nor deprives the Accused of a full and fair trial.

4. Facts. The Prosecution concurs with the facts stated by the Defense.

5. List of Legal Authority Cited.

a. *Madsen v. Kinsella*, 343 U.S. 341 (1952)

b. *United States v. Roland*, 50 M.J. 66, 69 (CAAF 1999);

c. *United States v. Kirkland*, 53 M.J. 22, 24 (CAAF 2000);

d. *United States v. Simpson*, 55 M.J. 674, 691-692 (ACCA 2001);

e. *United States v. Bertie*, 50 M.J. 489, 492 (CAAF 1999).

f. Military Commission Order No. 1, Para. 4A (3) (March 21, 2002).

g. Rule for Courts-Martial 405(d)(1), Manual for Courts-Martial (2002 ed.)

6. Discussion.

The Prosecution concurs that the Accused has a right to a trial by fair and impartial members. However, the procedure laid out in Commission Law, to include the opportunity to *voir dire* and challenge members, accords this to the Accused. Military Commission Order No. 1 (MCO No. 1) provides the correct standard for the selection of Commission members. Paragraph 4(A)(3) states that each member and alternate member

shall be a commissioned officer of the United States armed forces and that the Appointing Authority will appoint members and alternate members determined to be competent to perform the duties involved. MCO No. 1, Para. 4(A)(3). Article 25 of the Uniform Code of Military Justice (UCMJ), which governs the selection of *court-martial* members, does **not** apply to these proceedings.

a. General Counsel Acted Within His Authority and Discretion

(1) MCO No. 1 directs the Department of Defense (DoD) General Counsel to "issue such instructions consistent with the President's Military Order and this Order as the General Counsel deems necessary to facilitate the conduct of proceedings by such Commissions . . . ." MCO No. 1, para. 8(A)

(2) The Honorable Mr. William J. Haynes II, as DoD General Counsel, reasonably deemed it necessary to solicited nominees from the different Services. As these cases clearly are beyond the pale of any ordinary court-martial case, and as court-martial procedural rules do not pertain, his decision to solicit experienced potential members, in the rank of O-4 and above, was reasonable and within his discretion.

(3) The nomination process used by the Department of Defense and relied upon by the Appointing Authority was a reasonable means of obtaining a pool of competent Commission members. To ensure a cross-section of services were considered for selection, Mr. Haynes directed the different Branches to submit 25 nominees each. The Services selected from a pool of thousands of officers. To ensure a cross-section of components was considered for selection, Mr. Haynes also directed Service Secretaries to consider not only the active component, but also Reserve, National Guard, and Retired personnel. To ensure fairness in the proceedings, Mr. Haynes established as a "mandatory criteria" the "reputation for integrity and judgment." Based upon the unique and complex role of a military commission member as a trier of fact and law, and the potential need to process highly classified information during the course of a commission proceeding, Mr. Haynes established "mandatory criteria" of nominees in the grade of O-4 and above and a Top Secret security clearance and "Preferred Criteria" of "combat or operational experience" and "command experience." Nominees also submitted "Military Commission Member Data Sheets" to ensure the nominees' qualifications were current and verified by the nominee, and to ensure the availability of a nominee for service as a Commission member. This was a reasonable process to ensure that potential members were competent, fair, and available for service.

b. Appointing Authority has Discretion to Select Competent Commission Members

(1) MCO No. 1 gives the Appointing Authority the discretion to select officers whom he deems "competent" to perform the duties as Commission Members. MCO No. 1, Para. 4(A)(3). Competence in this setting includes: 1) the ability to evaluate fairly and impartially evidence presented during all phases of the proceedings; and 2) the ability to make applicable findings of fact and conclusions of law during all

phases of the proceedings. Bound only by the requirements that the Commission provide a "full and fair trial" to the Accused, and that Commission members be officers and competent to perform their duties, his selections were reasonable and completely within his discretion. *See* Presidential Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism (Presidential Military Order), Sec. 4(a) (2); MCO No. 1, Para. 4(A)(3).

(2) The selection process used by the Appointing Authority was a reasonable means of selecting fair and competent Commission members. From the nominees submitted by the Service Secretaries, the Appointing Authority reviewed a Military Commission Member Data Sheet, which provided information on assignment history, current position, grade/rank, date of birth, gender, date of initial entry on active duty, source of commission, security clearance, branch of service, awards and decorations, civilian and military education, and periods of non-availability. The Appointing Authority also had the opportunity to review up to three Officer Evaluation Reports from each nominee. The Appointing Authority also received counsel from his legal advisor, Brigadier General Thomas J. Hemingway, who advised the Appointing Authority that the Appointing Authority was not limited to appointing officers nominated by their services, but could appoint **any** qualified Military Officer of any United States armed forces. Brigadier General Hemingway also advised the Appointing Authority not to use rank, race, gender, religion, duty position, or branch of service for the deliberate or systematic exclusion of otherwise qualified persons from Commission membership. *See Exhibit 3, Defense Motion*. On 25 June 2004, the Appointing Authority accepted Brigadier General Hemingway's recommendations and personally selected Commission members. It is clear from the process that the Appointing Authority's selection process was designed to find personnel who were competent, fair, and available for service.

c. Article 25, UCMJ does not Apply to Military Commissions

(1) Defense insists that this Commission rely upon the standards articulated in Article 25, UCMJ for the selection of Commission Members and caselaw interpreting and applying court-martial standards. The President has acted within his war powers to direct that the Accused be tried by military commission, not court-martial. The President and, as delegated, the Secretary of Defense and DoD General Counsel, have established procedures that, while different from courts-martial, provide for fundamental fairness. Furthermore, the procedures governing military commissions have been sanctioned by Congress. With the codification of the UCMJ in Title 10 of the U.S. Code, Congress specifically preserved the procedures for military commissions in Article 21 as they have historically been recognized. As the Supreme Court recognized in *Madsen v. Kinsella*, 343 U.S. 341 (1952), a case decided after the UCMJ's enactment:

> Since our nation's earliest days, such commissions have been constitutionally recognized agencies for meeting many urgent governmental responsibilities related to war. They have been called our common law war courts. They have taken many forms and borne many names. *Neither their procedure nor their jurisdiction has been prescribed*

> *by statute. It has been adapted in each instance to the need that called it forth. * * **
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> With this practice before them, the Committees of both Houses of Congress recommended the reenactment of Article of War 15 as Article 21 of the new code. They said, "This article preserves existing Army and Air Force law which gives concurrent jurisdiction to military tribunals other than courts martial."

Madsen, 343 U.S. at 346-347, 351 n.17 (emphasis added).

(2) In publishing Military Commission Order No. 1, the Department of Defense deliberately chose different criteria for qualified Commission Members than for court-martial panel members. Commission Members must: 1) provide a "full and fair trial" to the accused; 2) be an officer from any armed service; and 3) be "competent" to perform their duties. *See* Presidential Military Order, Sec. 4(a) (2); MCO No. 1, Para. 4A (3). There is no directive that the Appointing Authority rely upon the standards articulated in Article 25, UCMJ or rely upon a nomination and selection process akin to those used in courts-martial.

(3) The different qualification criteria for Commission members than for court-martial panel members is indicative of the inherently different role that military commissions perform from traditional courts-martial. Courts-martial adjudicate alleged criminal offenses committed by service members under the UCMJ. In contrast, Military Commission Members are triers of both fact and law in trials where they must adjudicate alleged violations of the Law of Armed Conflict by enemy combatants. Additionally, military commissions are designed to consider and protect highly classified and sensitive information. More senior, experienced members are better suited to these functions.

d. UCMJ Applicability

(1) Although Article 25, UCMJ does not apply, the Prosecution prevails even under an analysis of Article 25, UCMJ case law. When Defense alleges an improper selection under Article 25, UCMJ, Defense shoulders the burden of establishing a "systematic inclusion or exclusion" of qualified personnel from the selection process. *United States v. Roland*, 50 M.J. 66, 69 (CAAF 1999). When Defense establishes such an inclusion or exclusion, the Government must show "by competent evidence that no impropriety occurred" in the selection process. *United States v. Kirkland*, 53 M.J. 22, 24 (CAAF 1999).

(2) A court-martial panel may not be "stacked" to achieve a desired result. *Roland*, 50 M.J. at 69 (*citing United States v. White*, 48 M.J. 251 (1998); *United States v. Hilow*, 32 M.J. 439, 440 (CMA 1991); *United States v. Smith*, 27 M.J. 242 (CMA 1988)). Although court "stacking," the deliberate inclusion or exclusion of members to achieve a desired result, is impermissible, not all systematic inclusions or exclusions constitute unlawful court stacking. *United States v. Simpson*, 55 M.J. at 674, 691 (involving the

intentional exclusion of nominees from the U.S. Army Ordnance School, the accused's place of assignment) (*citing United States v. Upshaw*, 49 M.J. 111, 113 (1998); *United States v. Lewis*, 46 M.J. 338, 341 (1997)). The motive of the convening authority is crucial in determining whether the panel selections constitute court "stacking." *Simpson*, 55 M.J. at 691. (citing *United States v. Smith*, 27 M.J. 242, 249 (C.M.A. 1988). For instance, courts have upheld that it was proper for convening authorities to take race, ethnicity, or gender into account during court-martial selection if the motive for doing so was to include such members as important segments of the military community. *Id*. However, if the motive for selecting particular members is to achieve a desired outcome, their selection violates Article 25(d) (2), UCMJ. *Id*. at 692. The court considers all of the evidence available in the record to determine whether an intent to "stack" actually existed. *United States v. Bertie*, 50 M.J. 489, 492 (CAAF 1999).

(4) There is no assertion of "court stacking," and nor reasonably could there be. As discussed, selecting nominees from thousands of qualified members in the ranks of O-4 and above to perform in this setting only evinces a desire to ensure that nominees are competent to provide a full and fair trial.

(5) Although the Defense states that the General Counsel's instructions excluded the majority of all commissioned officers in the armed forces from consideration, it does not necessarily follow that the General Counsel's instructions excluded the majority of **competent** officers from consideration. Duties as a Commission member necessarily require the member to play a quasi-judicial role. Other quasi-judicial roles in the military include serving on administrative separation boards, serving as an Investigating Officer under Article 32 of the UCMJ, and serving as a Commander, which involves making recommendations on potential courts-martial and determining appropriate disposition in nonjudicial punishment cases under Article 15, UCMJ. In these quasi-judicial roles, a preference for O-4s and above is the norm. *See, e.g.*, Discussion to Rule for Courts-Martial 405(d)(1), Manual for Courts-Martial (2002 ed.) ("The investigating officer should be an officer in the grade of major or lieutenant commander or higher or one with legal training").

7. Attached Files. None.

8. Oral Argument. If Defense is granted an oral argument, the Prosecution requests the opportunity to respond.

9. Witnesses/Evidence. None anticipated.

//Original Signed//

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Lieutenant Colonel, U.S. Marine Corps
Prosecutor